No. 98-234

(3)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

JUAN GARCIA-ABREGO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ A Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF AND APPENDIX

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SUPPLEMENTAL AUTHORITY

Additional authority has become available regarding Petitioner's argument in the Petition for Writ of Certiorari. This issue, which has recently come under considerable scrutiny by legal and lay journals alike is ripe for determination by this Court. Petitioner attaches as the appendix, the opinions which have issued and are available to counsel. The following cases cited are unobtainable:

U.S. v. Smith, No. 98-3172 (6th Cir. 1998);
U.S. v. Ward, No. ___ (6th Cir. 1998);
U.S. v. Morris, No.'s 97-6089, 97-6199, 97-6200 (6th Cir. 1998); and
U.S. v. Turnley, No. ___ (6th Cir. 1998).

Respectfully submitted,

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Aug. 4, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-368-CR-ZLOCH

UNITED STATES OF AMERICA,
Plaintiff,
vs.

OSLET FRANKLIN LOWERY, JR.,
Defendant.

THIS MATTER is before the Court upon the Defendant, Oslet Franklin Lowery, Jr.'s Motion To Suppress (DE 134). The Court has carefully reviewed said Motion and is otherwise fully advised in the premises.

In the instant Motion (DE 134), the Defendant has moved to suppress the anticipated testimony of his three co-Defendants, Guillermo Mallarino, Jose Ignacio Forero and Danny Morino, as the plea agreements in this matter secured such testimony in violation of Title 18, United States Code, Section 201(c)(2). On July 21, 1998, the Assistant United States Attorney and counsel for Defendant Lowery presented oral argument to this Court as to the aforementioned Motion.

Upon careful consideration of the instant Motion and of argument of counsel, the Court, for the reasons set forth below, finds that the plea agreements of the aforementioned co-Defendants in this matter violate the clear and unambiguous meaning of Section 201(c)(2). Accordingly, the Court finds that the testimony of each of said co-Defendants should be suppressed.

I. INTRODUCTION

The Court notes that the Government of the United States consists of three separate, but equal, branches: the Executive Branch, the Legislative Branch and the Judicial Branch. The actions complained of herein by Defendant Lowery were performed by the Executive Branch, acting through its Department of Justice. Therefore, for the sake of clarity, throughout this Order, such actions will be noted as those of the Executive Branch.

The Defendants, Oslet Franklin Lowery, Jr., Guillermo Mallarino, Jose Ignacio Forero and Danny Morino, were charged in a four-count Indictment with conspiracy to import cocaine, conspiracy to possess cocaine with intent to distribute it, importation of cocaine and possession of cocaine with intent to distribute it. Prior to the trial of the above-styled cause, Defendants Mallarino, Forero and Morino entered into cooperation plea agreements with the Executive Branch (DE Nos. 55, 58 and 65). Each agreement contemplated the substantial assistance, including but not limited to truthful testimony, of each respective Defendant. In exchange, the Executive Branch agreed "to evaluate the nature and extent of [each] Defendant's cooperation and to make [such] Defendant's cooperation, or lack thereof, known to the court at the time of sentencing" (DE 55 at 5; DE 58 at 5; DE 65 at 6). In addition, the Executive Branch agreed that if the Defendant's cooperation was of substantial assistance in the investigation and prosecution of criminal matters, the Executive Branch "may" make a motion pursuant to Title 18, United States Code, Section 3553(e), Section 5K1.1 of the United States Sentencing Guidelines or Rule 35 of the Federal Rules of Criminal Procedure. Sections 3553(e) and 5K1.1 and Rule

35 enable a sentencing court, upon motion of the Executive Branch, to depart downward from or reduce the otherwise applicable guideline sentence.

In the instant Motion (DE 134), Defendant Lowery asserts that the testimony of co-Defendants Mallarino, Forero and Morino should be suppressed as the aforementioned promises by the Executive Branch, which are contingent upon each co-Defendant's cooperation, and more precisely, testimony, violate Title 18, United States Code, Section 201(c)(2). In support of his position, Defendant Lowery cites the recent decision by the United States Court of Appeals for the Tenth Circuit, *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998). In *Singleton*, the Tenth Circuit concluded that the district court erred in denying the defendant's motion to suppress a witness' testimony where the Executive Branch, in return for such testimony, promised something of value to the witness, including advising the sentencing court of the nature and extent of the witness' cooperation. Specifically, the court determined that the Executive Branch's promises violated the plain language of Section 201(c)(2). On July 10, 1998, the Tenth Circuit vacated the *Singleton* opinion and granted a rehearing en banc. Although *Singleton* is no longer of precedential value, the Defendant adopts in its entirety the reasoning of the *Singleton* court.

Conversely, it is the Executive Branch's position that the *Singleton* case was wrongly decided and that this Court should follow the precedent of the United States Court of Appeals for the Eleventh Circuit interpreting Section 201(c)(2). In particular, the Executive Branch asserts that first, Section 201(c)(2) does not apply to the Executive Branch; second, the Eleventh Circuit's decision in *Golden*

Door Jewelry v. Lloyds Underwriters, 117 F.3d 1328 (11th Cir. 1997), has already decided the issue before this Court; third, the more specific provisions of the substantial assistance statutes should prevail over the more general Section 201(c)(2); fourth, it is a settled practice of the Executive Branch to engage in this type of agreement; and fifth, the aforementioned agreements do not violate the Florida Bar Rules of Professional Conduct. Noticeably absent from the Executive Branch's argument, however, is any recognition that the plain language of Section 201(c)(2) should control this Court's inquiry.

II. STATUTORY INTERPRETATION

In addressing the merits of the instant Motion (DE 134) as well as the Executive Branch's objections, the Court's initial task is to explore the pertinent rules of statutory construction. It is a basic tenet of statutory construction that "courts in applying criminal laws generally must follow the pain [sic] and unambiguous meaning of the statutory language." *Salinas v. United States*, 118 S.Ct. 469, 474 (1997). Thus, the starting point for interpreting a statute is naturally the "language of the statute itself." *Consumer Product Safety Com. v. GTE Sylvania, Inc.*, 458 U.S. 564, 571 (1982) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.") (internal citations omitted). As a general rule of statutory construction, where the terms of a statute are unambiguous, and where the "statutory scheme is coherent and consistent," judicial inquiry is complete. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989); *Rubin v. United States*, 449 U.S. 424, 430 (1981).

Indeed, courts must presume that, when enacting a statute, the legislature says what it means and means what it says; for it is a fundamental principle that " . . . Congress legislates with knowledge of [the] basic rules of statutory construction . . . " *McNary v. Haitian Refugee Center*, 498 U.S. 479, 495 (1991). Having ascertained the plain meaning of a statute, it then becomes the sole function of the judiciary "to enforce [the statute] according to its terms." *Ron Pair Enterprises, Inc.*, 489 U.S. at 241 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

As the Supreme Court recognized in *Deal v. United States*, 508 U.S. 129, 132 (1993), the meaning of a word cannot be determined in isolation. Thus, courts must draw from the language itself, the specific context of such language and the broader context of the entire statute. *Robinson v. Shell Oil Company*, 117 S.Ct. 843, 846 (1997). Further, terms which are not defined within a statute "are given their ordinary or natural meaning." *National Coal Association v. Chater*, 81 F.3d 1077, 1081 (11th Cir. 1996) (citation omitted).

Although the legislative history of a statute is of some relevance, courts should "not resort to legislative history to cloud a statutory text that is clear." *Id.* at 1082 (quoting *Ratzlaf v. United States*, 510 U.S. 135, 147 (1994)). Nor may an appeal to statutory purpose overcome the specific language of a statute, because the text is the most persuasive evidence of legislative intent. *Chater*, 81 F.3d at 1082; *Griffin*, 458 U.S. at 571.

Indeed, the plain language approach to a statute is essentially a rational approach. As the interpretive partners of Congress, the courts have a responsibility to review the

text of a statute with a common-sense degree of precision in an effort to ascertain the meaning of a statute. This common-sense reliance upon the plain statutory language also helps courts avoid the danger of mistakenly substituting their will for that of the legislature. For as United States Supreme Court Justice Antonin Scalia correctly and succinctly stated in his concurrence in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987): "Judges interpret law rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."

It is, however, a familiar rule of statutory construction that when a literal reading of a statutory term would produce an absurd result or one at odds with the whole statute, courts must look for other evidence of legislative intent in order to give the words their proper scope. *Rector, Etc. of Holy Trinity Church v. United States*, 143 U.S. 143 U.S. 457, 459 (1892); *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 454 (1989).

Guided by these principles of statutory construction, the Court will now examine the plain meaning of Section 201(c)(2).

III. TITLE 18, UNITED STATES CODE, SECTION 201(c)(2)

Title 18, United States Code, Section 201(c)(2) provides as follows:

> (c) Whoever –
>
> (2) directly or indirectly, gives, offers or promises anything of value to any person,

> for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, . . .

shall be fined under this title or imprisoned for not more than two years, or both.

18 U.S.C. § 201(c)(2). In addressing the merits of the instant Motion, as well as the substantial concerns of the Executive Branch, the Court will analyze each separate word or phrase as necessary.

First, Section 201(c)(2) applies to "whoever." The term "whoever" means "no matter who." (The American Heritage Dictionary 1380 (2d ed.1985). It is the Executive Branch's position that it simply does not fall within this seemingly unlimited statutory class. In *Nardone v. United States*, 302 U.S. 379, 383 (1937), the United States Supreme Court recognized a limited rule of statutory construction which provides that a statute does not apply to the Government, in this case, the Executive Branch, or affect its rights unless the text clearly and indisputably includes the Executive Branch. This canon, however, operates to exclude the Executive Branch only in two types of cases. In the first instance, the Executive Branch is excluded where a statute "if not so limited, would deprive the [Executive Branch] of a recognized or established prerogative title or interest." *Id.* Nevertheless, where the law operates upon the agents or servants of the Executive Branch, rather than on the Executive Branch, itself, this rule of exclusion of the Executive Branch is "less stringently applied." *Id.* Thus, where there is no evidence of a contrary legislative purpose, legislation, worded in general terms, is construed to apply to all persons, including

public officers and agents. *City of Buffalo v. Hanna Furnace Corp.*, 305 N.Y. 369, 374 (N.Y. 1953) (citing *Nardone v. United States*, 302 U.S. 379 (1937); *United States v. State of Arizona*, 295 U.S. 174, 55 S.Ct. 666, 79 L.Ed. 1371 (1935); and *Dollar Sav. Bank v. United States*, 86 U.S. 227 (1873)).

Even assuming that the Executive Branch has a recognized or established interest in securing the cooperation of defendants, the Executive Branch cannot establish that Section 201(c)(2) operates on the *Executive Branch*, as opposed to individual federal officers. While the Executive Branch correctly asserts that the Department of Justice acts on behalf of the Executive Branch, it is the actions solely of the agents of the Executive Branch which are at issue. That is, Section 201(c)(2) impacts only upon the method of investigation and prosecution chosen by the agents of the Executive Branch in representing its interests. Because alternative methods, which comply with Section 201(c)(2), remain available to such agents, the Executive Branch's overall interest in securing cooperation of defendants, or in otherwise fighting crime, will not be impeded. Therefore, Section 201(c)(2) in no way operates upon the Executive Branch itself.

Moreover, there is no evidence of any legislative purpose which would release the Executive Branch from the general terms of Section 201(c)(2). Indeed, a careful reading of Section 201(c) as a whole easily dispels any notion that Congress intended to exclude the Executive Branch from Section 201(c)(2). In sharp contrast to Section 201(c)(2), Section 201(c)(1) expressly exempts the Executive Branch from its operation. Section 201(c)(1) applies to the same general class of "whoever," but then provides one important limitation: "otherwise than as provided by law for

the proper discharge of official duty. . . . " 18 U.S.C. § 201(c)(1). This limitation is conspicuously absent from Section 201(c)(2). It is well understood that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, 118 S.Ct. 285, 290 (1997) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation omitted)). Because Congress clearly exempted the Executive Branch from application of Section 201(c)(1), this Court must assume that Congress knew how to do the same in Section 201(c)(2), but intentionally chose not to do so. Given Congress' intentional omission of an official duty exemption, it is not this Court's function to insert or insinuate such an exemption.

In the second instance where *Nardone* would exclude the Executive Branch from operation of the statute, public officers are excluded where "a reading which would include such officers would work obvious absurdity." *Nardone*, 302 U.S. at 383. In this matter, however, inclusion of the Executive Branch and its agents hardly works an obvious absurdity. It is elementary that testimony obtained through inducement is inherently unreliable. Nor is there any dispute that Section 201(c)(2) clearly prohibits a defendant from promising or giving a thing of value in exchange for a witness' testimony. It is axiomatic, therefore, that if the judicial process is tainted by the admission of unreliable testimony induced by a defendant's promises, it is no less tainted by the identical actions of the prosecutor.

While the Court's finding herein may preclude the Executive Branch from securing testimony in a certain manner, it clearly does not preclude it from obtaining cooperation from an individual or from consequently rewarding such individual. Nor does it prohibit a witness from testifying at trial or other court proceedings, either on his own initiative or under compulsion. With this ruling, the Court simply recognizes that the dangers of permitting officers of the Executive Branch to engage in bargaining for testimony are as substantial as when a defendant does the same. Where a witness, either for the Executive Branch or the defense, knows that a promise of leniency or other thing of value is inextricably intertwined with his testimony, the incentive to lie and to curry favor is tremendous. Thus, application of Section 201(c)(2) to all persons, including the prosecution, would not work an obvious absurdity, but would clearly preserve the integrity of the judicial process.

It follows then, that Section 201(c)(2) undoubtedly is intended to prevent an injury or a wrong; specifically, the perversion of the judicial process. Thus, *Nardone* instructs that the Executive Branch is included in the terms of Section 201(c)(2). *Nardone*, 302 U.S. at 384.

Moreover, the Constitutional form of Government which has guided this country for over two-hundred and twenty years demands that the Executive Branch be subject to the laws enacted by the United States Congress. At last glance, the United States was a democracy – not a monarchy. Thus, neither the United States Attorney, the Department of Justice nor the Executive Branch is above the law, but is subject to it in the same manner and to the same degree as an ordinary citizen. That is, the Executive

Branch may not pick and choose which laws it will follow and which it will disregard. Accordingly, the Court finds that the Executive Branch and its agents are unquestionably subject to the provisions of Section 201(c)(2).

Second, there is no doubt that the Executive Branch is giving, offering or promising a "thing of value" to the co-Defendants in this matter. The term "thing of value" has been broadly construed to envelop both tangibles and intangibles. *See United States v. Marmolejo, Jr.*, 89 F.3d 1185, 1192 (5th Cir. 1996) (citing *United States v. Nilsen*, 967 F.2d 539, 542 (11th Cir. 1992)). Thus, a "thing of value" has been interpreted to include amusement, information and sexual intercourse. *Id.* Further, the focus is not upon an item's actual value, but upon what value a defendant subjectively attaches to the items received. *United States v. Williams*, 705 F.2d 603, 622-23 (2nd Cir. 1983).

In each of the plea agreements before this Court, the Executive Branch promised to advise the sentencing Court of the nature and extent of the Defendant's cooperation. In addition, the Executive Branch promised that it "may" file a motion for downward departure or reduction in sentence if it finds the Defendant's assistance to be substantial. It is difficult to imagine something of greater subjective value to a defendant facing incarceration than the promise of a lesser sentence. Therefore, the Court finds that the promises made by the Executive Branch to the co-Defendants clearly involve a "thing of value."

Third, the Court must find that each "thing of value" was given, offered or promised "for or because of" each co-Defendant's testimony. Under the "for or because of"

requirement, the gift, offer or promise and the testimony need not motivate each other, there is no quid pro quo. *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 966 (D.C. Cir. 1998) (construing "for or because of" language in Section 201(c)(1)). Rather, "[t]he relation may be simply one of reward. . . . for an act taken in the past or to be taken in the future." *Id.* Therefore, "a gift looking to future acts can be [unlawful] where the giver is motivated simply by the desire to increase the likelihood of one or more specific, favorable acts." *Id.*

Each of the plea agreements in this matter indicates that the respective promises of leniency were made "for or because of" each co-Defendant's testimony. In other words, the promise of the Executive Branch to evaluate and advise the Court of each co-Defendant's cooperation, including testimony, as well as the potential for a substantial assistance motion, were rewards for such co-Defendant's actions in the past and in the future. Further, each plea agreement was executed prior to the trial of the remaining Defendant, Oslet Franklin Lowery. Obviously, the Executive Branch was motivated to offer such promises to the co-Defendants in order to increase the likelihood that each would testify at trial. Therefore, the Court finds that the plea agreements in the instant case easily satisfy the "for or because of" requirement.

The Court is mindful of the Executive Branch's argument that a plain language approach to Section 201(c)(2) produces an absurd result. Such an argument is, however, without merit. Rather, including the Executive Branch and its leniency agreements within the reaches of Section 201(c)(2) ensures that the judicial process will remain untainted by the admission of purchased testimony.

Indeed, allowing the Executive Branch to buy testimony would produce the absurd result of the Executive Branch being subject to one set of rules while the defense is subject to another. Certainly, if testimony purchased by a defendant is tainted, testimony purchased by the Executive Branch is no less tainted. The most logical construction of Section 201(c)(2), therefore, is one that prohibits *all* agreements for testimony, irrespective of who enters into them.

The Executive Branch further argues that prohibiting all agreements for testimony has the "absurd result" of compromising past and ongoing criminal prosecutions. The Court, then, must look for other evidence of legislative intent in order to give the terms of Section 201(c)(2) their proper scope. Upon reviewing Section 201 as a whole, as well as its legislative history, it is clear that, despite the impact upon criminal prosecutions, this Court has correctly interpreted the plain language of Section 201(c)(2).

Congress enacted the predecessor to Section 201(c)(2) in order to prohibit giving or receiving a thing of value "by . . . witnesses 'for' or 'because of'. . . . " H.R. Rep. No. 87-748, at 19 (1961) (discussing 18 U.S.C. § 201(h)). Such exchanges for testimony were recognized by Congress as having "the appearance of evil and the capacity as serving as a cover for evil." *Id.* at 19. No distinction was made, however, between exchanges involving the Executive Branch and a witness and those involving a defendant and a witness. Rather, Congress made the prohibition applicable to "whoever," including the Executive Branch. *Cf.* 18 U.S.C. § 201(c)(1). Thus, from its original enactment, *all* agreements for testimony violated Section 201(c)(2), whether made by the Executive Branch

or the defense. The fact that the courts, the Executive Branch and the defense have not applied Section 201(c)(2) to the Executive Branch is, therefore, wholly irrelevant to this Court's inquiry.

While criminal prosecutions might be impacted by this Court's ruling, this, in and of itself, is certainly not a reason for the Court to disregard the plain words of the Statute. Indeed, focusing solely on the current effects of a plain meaning interpretation of Section 201(c)(2) impermissibly obscures Congress' clear intent of prohibiting the evil of purchased testimony. Moreover, it is simply not the judiciary's place to rewrite Congressional intent simply because the plain meaning of a statute, ignored for fifty years, suddenly has profound implications.

In addition, to the extent that one may argue that this Court's interpretation of Section 201(c)(2) is at odds with the legislative scheme of the Statute, this argument is easily dismissed. Section 201(c)(1) expressly excludes the Executive Branch from its reach. Section 201(c)(2) does not. Therefore, reading both Sections together leads to the obvious conclusion that Congress intended one Section to include the Executive Branch and the other to exempt the Executive Branch. Why Congress chose to differentiate between these two Sections is not for this Court to surmise. That Congress explicitly did so, however, is a clear indication that this Court has given the terms in Section 201(c)(2) their proper scope.

Further, Section 201(d) provides an exception for payment of witness fees. 18 U.S.C. § 201(d). It is evident that because Congress made an explicit exception for such payments, under the plain language of Section 201(c)(2),

such payments would otherwise have been prohibited. Therefore, this Court's broad interpretation of the term "thing of value" is consistent with Section 201, as a whole.

In light of the foregoing, the Court finds that the Executive Branch is clearly subject to Section 201(c)(2) and that the Executive Branch's promises to the co-Defendants in this matter violate the plain language of Section 201(c)(2).

IV. ELEVENTH CIRCUIT PRECEDENT

Relying upon the Eleventh Circuit's decision in *Golden Door Jewelry v. Lloyds Underwriters*, 117 F.3d 1328 (11th Cir. 1997), the Executive Branch insists that the plea agreements in this matter conform with Section 201(c)(2) because each agreement explicitly prohibits false testimony. In *Golden Door*, it was argued that a payment to a witness violated Section 201(c)(2), even though such payment was not in exchange for *false* testimony. *Id.* at 1335 n. 2. (emphasis supplied). Relying upon its previous decision in *United States v. Moody*, 977 F.2d 1420, 1425 (11th Cir. 1992), a panel of the Eleventh Circuit summarily rejected this argument.

A careful review of both *Golden Door* and *Moody*, however, leads this Court to conclude, most respectfully, that *Golden Door* applied the *Moody* holding out of context. In *Moody*, a different panel of the Eleventh Circuit was faced with resolving overbreadth and vagueness challenges to Section 201(c)(2). The defendant had bribed a witness to testify in his favor and had promised more money if she had to testify again. In concluding that Section 201(c)(2) was not overly broad, the court held that the defendant's

conduct was "clearly within the statute's 'legitimate sweep.' " *Id.* at 1424. Further rejecting the defendant's vagueness challenge, the court stated that Section 201(c)(2) "obviously proscribes a bride [sic] for false testimony; persons of ordinary intelligence would come to no other conclusion." At no point, however, did the *Moody* court intimate that Section 201(c)(2) applied *only* to false testimony.

Notwithstanding the limited reach of the *Moody* holding, the panel in *Golden Door* cited *Moody* for the broad proposition that Section 201(c)(2) is violated only when false testimony is involved. The Court notes that where there are conflicting decisions between two panels of the same court, the earlier decision is presumptively correct. *See Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1166 (5th Cir. 1984); *see also, Kent v. Baker*, 815 F.2d 1395, 1400 n.3 (11th Cir. 1987). Thus, to the extent that the *Golden Door* holding conflicts with *Moody*, the earlier decision rendered in *Moody* is presumptively correct and should be followed in its entirety. Therefore, consistent with *Moody*, the Court finds that under the plain language of Section 201(c)(2), Section 201(c)(2) applies to all testimony, whether false or truthful.

V. SECTION 201(c)(2) IN RELATION TO OTHER STATUTES

The Executive Branch further argues that statutes enacted subsequent to Section 201(c)(2) limit or invalidate the operation of this Section. In particular, the Executive Branch points to Title 18, United States Code, Section 3553(e), Section 5K1.1 of the United States Sentencing

Guidelines and Rule 35 of the Federal Rules of Criminal Procedure. These statutes, referred to as the substantial assistance provisions, allow the Executive Branch to seek a downward departure or reduction in sentence based upon a defendant's substantial assistance in the investigation or prosecution of criminal matters. Because these statutes include assistance in the prosecution of a case, the Executive Branch asserts that it is not restricted by Section 201(c)(2) from making promises in exchange for testimony.

The Court is unpersuaded by this argument. It is a well-settled rule of statutory construction that a specific, narrowly drawn statute takes precedence over a more generally applicable statute. *Simpson v. United States*, 435 U.S. 6, 15 (1978); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 158 (1976). While Sections 3553(e) and 5K1.1 and Rule 35 contemplate the more general "substantial assistance," which may includes [sic] testimony, Section 201(c)(2) applies solely to testimony. Thus, Section 201(c)(2) takes precedence over the subsequent, more general substantial assistance provisions.

Further, where it appears that two statutes clash in whole or in part, it is the province of this Court "so far as [it] can by any fair construction" to reconcile the statutes to each other. *The Federalist No. 78*, at 396 (Alexander Hamilton) (Garry Wills ed., 1982). Thus, so long as two statutes are not positively repugnant, the Court must give effect to both. *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992) (citations omitted).

This Court is not convinced that Section 201(c)(2) and the substantial assistance provisions are in conflict, but

believes they may be reconciled in the following way. The Court recognizes that there are numerous ways in which a defendant may offer substantial assistance both in the investigation and prosecution of a case. Testifying at trial or other proceedings is just one means by which a defendant may "substantially assist" in a case. While Section 201(c)(2) explicitly prohibits giving, offering or promising a thing of value for or because of testimony, it does not preclude a reward for all other forms of substantial assistance. Nor does it preclude a witness from testifying at trial. Thus, Section 201(c)(2) and the substantial assistance provisions may be read together to allow substantial assistance motions as rewards for all types of cooperation, excluding testimony.

VI. POLICY CONSIDERATIONS

As previously noted, at no time during the oral argument on this matter did the Executive Branch base its case upon the plain language of Section 201(c)(2). Instead, the Executive Branch argued that policy considerations should somehow contravene the express language chosen by Congress in Section 201(c)(2). Specifically, the Executive Branch noted that a plain reading of Section 201(c)(2) would upset the Executive Branch's settled practice of offering a reduced sentence in exchange for testimony. The Court agrees that the implications of a plain meaning interpretation of Section 201(c)(2) are serious for both the Executive Branch and the defense. Nevertheless, this factor does not excuse the Court from performing its duty of proper statutory interpretation.

It is simply not this Court's Constitutional function to assume the role of a policymaker or legislator by altering the plain meaning of the statute. Such a function lies solely with the Legislative Branch which is elected by and accountable to the people. As the Supreme Court has correctly recognized, "[t]he remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court. Congress may amend the statute. [The Court] may not." *Griffin*, 458 U.S. at 576 (citations omitted).

Indeed, this is the precise issue which concerned Alexander Hamilton when he wrote:

> The Courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.

The Federalist No. 78 at 396 (Alexander Hamilton) (Garry Wills ed., 1982). Thus, "when a [judge] follows his personal policy predilections he is engaged in something other than the practice of constitutional law. To a very real extent, therefore, a Court that refrains from indulging int he [sic] formulation and implementation of policy is essential to the maintenance of constitutional government." Eugene W. Hickok, Jr., *On Federalism*, III Benchmark 229, 238 (1987). It is imperative, therefore, that judges "identify, respect, and maintain appropriate limits on judicial power. . . . " Lillian R. BeVier, *Judicial Restraint: An Argument From Institutional Design*, 17 Harvard Journal of Law & Public Policy 7 (1994). Only by adhering to this philosophy will courts "govern according to the rule of law rather than whims of politics and

personal preference." ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION of the LAW* 318 (1990).

With these points in mind, the Court takes issue with those courts which advocate policy considerations over the plain text of Section 201(c)(2). Not surprisingly, in these days of judicial activism, there are increasing numbers of judges who either ignore the law created by the Legislative Branch or behave as though the Legislative Branch and the Judicial Branch are one. These activist judges simply disregard the plain and ordinary meaning of statutes and rules, eager to substitute their own "notions of good social policy." Lino A. Graglia, *Do We Have An Unwritten Constitution? – The Privileges Or Immunities Clause Of The Fourteenth Amendment*, 12 Harvard Journal of Law & Public Policy 83, 88-89 (1989).

For example, this practice is nowhere more apparent than in the growing list of "rights" which has inundated federal and state law. Judges have created from the most distant penumbras of the Constitution unprecedented rights or interests under the guise of "liberty" and "privacy." Such craftsmanship, however, is simply intellectually dishonest and has no place in the judicial system. Moreover, those judges who seek to advance their own agendas or pander to popular causes should have the intellectual honesty to resign from the Bench and run for public office.

Accordingly, the Court, mindful of its proper role within this Constitutional form of Government, declines the Executive Branch's invitation to heed policy considerations over the plain and unambiguous meaning of this

Statute. While the Court appreciates that its ruling herein upsets the Executive Branch's settled practices, the Court cannot rule otherwise: the Court is simply not authorized to usurp the legislative function properly left to the United States Congress.

VII. RULE 4-3.4(b) OF THE RULES OF PROFESSIONAL CONDUCT

Rule 4-3.4(b) of the Rules of Professional Conduct for the Florida Bar provides as follows:

> A lawyer shall not:
>
> > (b) fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness . . .

It is the Executive Branch's position that Rule 4-3.4(b) does not proscribe offers of leniency by the Executive Branch in exchange for a witness' truthful testimony. The Court finds this argument to be without merit. First, there is nothing in Rule 4-3.4(b) which excludes the Executive Branch from its purview. Second, the Rule does not distinguish between truthful or untruthful testimony – all inducements for any testimony are forbidden. *See Golden Door Jewelry Creations, Inc.* [sic] *Lloyds Underwriters Non-Marine Association*, 865 F.Supp. 1516, 1526 (S.D. Fla. 1994). Third, a witness has a "solemn and fundamental duty to tell the truth." *Id.* Thus, any inducement offered by any party would undermine the administration of justice. Lastly, Rule 4-3.4(b) does not distinguish between inducements permissible by law and inducements prohibited by law. Thus, the Executive Branch's argument that the Supreme Court of Florida has long recognized the Executive Branch's practice of offering

leniency for testimony is of no avail in interpreting this Rule. Rather, it is apparent that all inducements, whether contrary to law or not, are precluded. Moreover, none of the Florida cases cited by the Executive Branch addressed the prohibition against inducements found in Rule 4-3.4(b).

In light of the foregoing, the Court finds that the inducements offered by the Executive Branch to each of the co-Defendants in this matter violate the prohibition set forth in Rule 4-3.4(b) of the Rules of Professional Conduct.

The Court adds that even if this Court were to find that there was no violation of Rule 4-3.4(b), such a finding would not assist the Executive Branch. The fact remains that the Executive Branch would still be in violation of Section 201(c)(2).

VIII. REMEDY

In the instant Motion (DE 134), Defendant Lowery moves this Court to suppress the anticipated testimony of co-Defendants Mallarino, Forero and Morino. In response thereto, the Executive Branch contends that suppression is inappropriate as Section 201(c)(2) provides only for a possible fine and/or imprisonment for violations thereof. Accordingly, the additional remedy of suppression should not be grafted onto the statute.

In support of its argument, the Executive Branch cites *United States v. Thompson*, 936 F.2d 1249, 1251-52 (11th Cir. 1991), wherein the Eleventh Circuit concluded that where "Congress specifically designates a remedy for one of its acts," courts should not read the exclusionary rule into

the statute. Further, the court noted that implementing a "judicially imposed exclusionary remedy" would be disproportionate to the infraction in that case. *Id.* at 1252.

Ordinarily, courts should not create a remedy where Congress has already provided one. Nevertheless, the Court recognizes that, in this instance, strict adherence to this principle would result in there being no enforceable remedy. That is, the Court, as a member of the Judicial Branch, cannot order the Executive Branch to investigate, prosecute and punish itself for a violation of this Section. To do so would infringe upon the exclusive province of the Executive Branch – to execute the laws of this country. However, "[f]ederal courts sit to enforce federal law." *United States v. Chemaly*, 741 F.2d 1346, 1354 n. 2 (11th Cir. 1984). Therefore, there must be some means by which the Court may compel obedience to Section 201(c)(2). Accordingly, the Court is left to fashion an appropriate judicial remedy. *See United States v. Calandra*, 414 U.S. 338, 347-48 (1974).

Upon careful review of this matter, the Court finds that suppression of the co-Defendants' testimony is the appropriate remedy for the Executive Branch's violation of Section 201(c)(2) and to "deter future unlawful [prosecutorial] conduct." *United States v. Calandra*, 414 U.S. 338, 352 (1974). By the Executive Branch's own admission, making promises in exchange for testimony is a long-standing and pervasive practice in criminal prosecution. This Court cannot conceive a more effective means of deterring the Executive Branch from entering into prohibited leniency agreements than to exclude the very fruits of its efforts. Further, exclusion of the co-Defendants' testimony will eliminate any incentive on the part of the

Executive Branch to defy Section 201(c)(2). *Elkins v. United States*, 364 U.S. 206, 217 (1960). By suppressing the ill-gotten testimony, the Court removes the sole motivation for the Executive Branch to disregard Section 201(c)(2), and compels respect for those Congressional enactments designed to preserve the integrity of the judicial system.

The Court is constrained to note that the lack of a stated remedy against the Executive Branch in no way abrogates this Court's finding that the Executive Branch is subject to Section 201(c)(2). Section 201(c)(2) very clearly encompasses official misconduct, for which the appropriate and established remedy is suppression. *See United States v. Russell*, 411 U.S. 423, 430 (1973). Therefore, it was unnecessary for the explicit remedy of suppression to be spelled out in the Statute.

In addition, the Court is mindful that the Federal Rules of Evidence impose upon the judiciary an affirmative responsibility to act as a "gatekeeper" in allowing relevant testimony and evidence before a jury. *See Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 583 (1993). Specifically, Rule 104(a) requires the Court to determine "[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence." Fed. R. Evid. 104(a). Further, Rule 403 provides as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403. Therefore, in order to preserve the integrity of the adversarial system, the Court is required to reject testimony or evidence which is so inherently unreliable that its admission would create a danger of unfair prejudice or mislead the jury. *Taylor v. Illinois*, 484 U.S. 400, 414 (1988).

For example, a trial judge has the discretion to exclude a hearsay statement or a known perjurious statement under Rule 403 where the statement is so unreliable that its probative value is "substantially outweighed by the danger of prejudice and confusion." *See e.g., Precision Piping and Instruments, Inc. v. E. I. du Pont de Nemours and Company*, 951 F.2d 613, 620 (4th Cir. 1991). This same reasoning applies with no less force to the instant matter.

In this case, the Executive Branch has, quite simply, purchased the testimony of the co-Defendants through promises of leniency. Each co-Defendant, therefore, has every reason to fabricate, falsify or exaggerate his testimony in an attempt to curry favor with the Executive Branch. That the respective plea agreements prohibit false testimony is of no assistance, as a defendant may fashion his testimony in such a way that it will not be false, but nor will it be truthful.

Purchased testimony is inherently unreliable and will only serve to taint and obscure the entire judicial process. Further, the Executive Branch has no protected interest in presenting such testimony at trial. Because the dangers of unfair prejudice and confusion to the jury substantially outweigh the Executive Branch's interest in presenting

the testimony, the testimony is properly excluded. Therefore, the Court finds that the anticipated testimony of the co-Defendants in this matter should be suppressed.

IX. CONCLUSION

The Court's finding herein, although lengthy, may be reduced to one simple principle: it is not this Court's Constitutional function to engage in legislation. By invoking the theory that "settled expectations" demand exclusion of the Executive Branch from the reaches of Section 201(c)(2), the Executive Branch requests that this Court usurp the function properly left to the United States Congress. Moreover, the Executive Branch's theory amounts to nothing more than this: it has always been done this way, so it must be right. Such reasoning has never been the proper basis for a legal ruling and this Court refuses to make it the basis for one now.

Further, if, as the Executive Branch asserts, Section 201(c)(2) obviously excludes the Executive Branch, the Court feels compelled to question the need for legislation, hurriedly introduced in the wake of *Singleton* on July 15, 1998, to amend the Statute. *See* S. 2314, 105th Cong. (1998). By such action, Congress has reinforced the conclusion that Section 201(c)(2) presently includes the Executive Branch.

Finally, the Court notes that the testimony of cooperating witnesses and cooperating defendants is a valuable resource for law enforcement in the investigation and successful prosecution of criminal activity. Any exclusion, however, of the Executive Branch from Section 201(c)(2)

must come from the Legislative Branch, and not the Judicial Branch. A judge's authority has limits and outside those limits or designated areas, the democratic institutions govern. Thus, if any changes are to be made to Section 201(c)(2), or if more appropriate, the substantial assistance provisions, it is solely for Congress, and not for the courts or the Executive Branch, to make them.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED that the Defendant, Oslet Franklin Lowery, Jr.'s Motion To Suppress (DE 134) be and the same is hereby GRANTED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 4th day of August, 1998.

/s/ WILLIAM J. ZLOCH
United States District Judge

Copies furnished:

David Cora, Esq., AUSA
Adalberto Jordan, Esq., AUSA

Philip Horowitz, Esq.
For Defendant Lowery

UNITED STATES of America

v.

Fernando FRAGUELA

No. CRIM.A. 96-0339.

United States District Court,
E.D. Louisiana.

Aug. 27, 1998.

ORDER & REASONS

BERRIGAN, District J.

The matter is before the Court on motion for new trial by defendant Fernando Fraguela.

Citing the 10th Circuit decision of *United States v. Singleton*, 144 F.3d 1343, Fraguela contends the testimony of several of the pivotal witnesses against him was procured in violation of 18 U.S.C. 201(c)(2). The Court agrees and GRANTS the motion for new trial.

The Court adopts as much of its rationale the original panel decision in Singleton as well as Judge Zloch's district court decision in *United States v. Lowery*, 1998 WL 493818 (S.D.Fla.), which is attached hereto [attachment omitted in printing]. The Court is aware that the Singleton panel decision has been vacated. The Court is also aware of the following district court decisions that have declined to follow Singleton: *United States v. Guillaume*, 1998 WL 462199 (S.D.Fla.); *United States v. Reid*, 1998 WL 481459 (E.D.Va.) and *United States v. Arana*, 1998 WL 420673 (E.D.Mich.).

The following additional reasons led to this Court's decision.

Most persuasive is the clear, plain language of the statute itself. A district court is to apply statutory law as expressed when the language is unambiguous. 201(c)(2) is clear and unambiguous. None of the arguments made by the government challenge, nor could it challenge, the fact that the language of the statute itself is clear and inclusive. When a statute is clear, is it inappropriate for a court to look behind it or around it or read into it meanings and intent that are not expressed.

Secondly, applying this statute to the government does not in fact lead to absurd results, as argued by the government. On the contrary, it would lead to greater reliability in our judicial system. The statute prohibits virtually all inducements that could be offered a person in exchange for testimony. All such inducements have the inherent tendency to encourage tainted testimony and to induce a witness to shade the testimony in a manner pleasing to the inducer. As Judge Zloch stated in the *Lowery* case, "Where a witness, either for (the government) or the defense, knows that a promise of leniency or other thing of value is inextricably intertwined with its testimony, the incentive to lie and curry favor is tremendous. Thus, application of Section 201(c)(2) to all persons, including the prosecution, would not work an obvious absurdity, but would clearly preserve the integrity of the judicial process." 1998 WL 493818.

A theme of the government's argument is that somehow when the government offers the inducement, it will get "truthful" testimony. Government inducements do not guarantee truthfulness any more than the private inducements would that are unquestionably prohibited

by the statute. Regardless of the good faith of the individual prosecutor, any inducement is as much, if not more, a temptation to fabricate than it is to tell the truth. In terms of the inducement itself, it is frankly difficult to envision a more powerful incentive to shade testimony a particular way than avoiding a criminal conviction or avoiding loss of freedom. It is a reality that when the prosecution tells a cooperating witness he must 'tell the truth' it is the same prosecution that determines what the 'truth' is, regardless of the good faith of the prosecutor. This is obvious to the cooperating witness. Consequently, if the cooperating witness' testimony is not consistent with what the prosecution perceives the truth to be, there is no leniency. This does not appear to be conducive to encouraging untainted 'truthful' testimony.

Related to the above, applying 201(c)(2) to the government also improves the integrity of the judicial system by leveling the playing field. As already mentioned, the government has powerful prosecutorial tools in its arsenal; tools that are unavailable to the defense. These include the power to call persons before a grand jury; to send out FBI agents with the authority of that office to interview potential witnesses; the power to grant immunity which erases a person's Fifth Amendment privilege and compels the person to testify; the power to decide who to charge with what criminal offenses; the power to indict, to dismiss and reduce charges. The defense has no such actual authority nor even the trappings of such authority to aid in the preparation of their case. In addition to that disparity, 201(c)(2) clearly applies to the defense and prohibits the defense from offering any inducement to a witness at all, except routine travel

expenses or costs. To find 201(c)(2) inapplicable to the prosecution, just gives the prosecution yet another powerful weapon that is not shared by the defense for no, frankly, logical reason. This is inequitable and to disallow it leads to sound, not absurd, results.

Lastly, this Court is not persuaded by the argument that the government prosecution will be crippled if 201(c)(2) applies to them. In federal court, district judges are statutorily prohibited from participating in plea agreement discussions. Nevertheless, defendants commonly plead guilty, not knowing what the sentence will be, and being expressly told that anything their attorney or someone else has told them regarding the sentence is not binding on the judge. Undoubtedly defendants plead guilty hoping to earn downward points in the guideline calculation for acceptance of responsibility and hoping for a bottom of the guideline or below guideline sentence, but they have not been promised such an outcome. Likewise, here, witnesses faced with criminal charges even without outright promises of leniency from the government will undoubtedly still cooperate, encouraged by the practical reality and hope for some sort of benefit if they do. The government's efforts will not be crippled, and the integrity of the entire process will be enhanced.

Consequently, for all the above reasons, this Court concludes that 18 U.S.C. 201(c)(2) does and should apply to government plea bargaining. In this case, it is undisputed that pivotal testimony against the defendant was acquired through that process. This Court concludes the appropriate remedy is a new trial.

UNITED STATES OF AMERICA v. JOHN EISENHARDT

Crim. No. S 95-0468, Civil No. S 98-2521

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

1998 U.S. Dist. LEXIS 11663

July 30, 1998, Opinion Filed

DISPOSITION: Motion for Relief pursuant to *28 U.S.C. section 2255* SUMMARILY DISMISSED, pursuant to Rule 4(b), Rules Governing Section 2255 Proceedings.

COUNSEL: Lynne A. Battaglia, U.S. Attorney for the District of Maryland, Joseph L. Evans, Assistant U.S. Attorney, Baltimore, MD, For Government, Respondent.

Andrew Radding, Robert D. Schulte, ADELBERG, RUDOW, DORF, HENDLER & SAMETH, LLC, Baltimore, MD, For Defendant/Petitioner.

JUDGES: Frederic N. Smalkin, U.S. District Judge.

OPINION BY: Frederic N. Smalkin

OPINION: MEMORANDUM OPINION

The defendant in this criminal case has filed, by counsel, a motion for postconviction relief pursuant to *28 U.S.C. section 2255*. In that the Court's review of the motion in light of the files and records of the Court convince it beyond any question that the movant is not entitled to any relief in this Court, an order will be entered separately, summarily dismissing the motion, pursuant to Rule 4(b), Rules Governing Section 2255 Proceedings.

The defendant's first argument is that his guilty plea to the offense of conspiracy was tainted and induced by

the fact that various potential witnesses against him were co-operators in an ongoing child pornography investigation in the District of New Jersey, who had been given or promised favorable treatment by federal prosecutors in exchange for their testimony. Citing the recent panel decision of the Tenth Circuit in *United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998)*, rehearing en banc granted and panel opinion vacated, ___ *F.3d* ___, *1998 U.S. App. LEXIS 15451* (10th Cir. July 10, 1998), the defendant argues that his prosecution was tainted by violation of *18 U.S.C. section 201*, and that all evidence flowing from co-operators was poisoned by such violation, on account of prosecutorial violation of *18 U.S.C. section 201*.

The Court, first, notes that the panel opinion in Singleton has been vacated. Thus, it is no longer of any authoritative weight at all. Furthermore, it never was, in my judgment, persuasive authority. Before it was vacated, the undersigned read that opinion, and he concluded that it was amazingly unsound, not to mention nonsensical, especially in its creation ex nihilo of an exclusionary rule barring testimony from virtually every cooperating federal witness. The chances of either or both the Fourth Circuit and the Supreme Court reaching the same conclusion as the Singleton panel are, in this Court's judgment, about the same as discovering that the entire roster of the Baltimore Orioles consists of cleverly disguised leprechauns.

The defendant's second point is that he was denied effective assistance of counsel in the pretrial stage of the proceedings. He complains that the Maryland attorney who represented him pre-charging in New Jersey (the case having been transferred here for guilty plea to a

criminal information pursuant to Fed.R.Crim.P. 20) was not competent in the early stages of the investigation, when he allegedly gave Mr. Eisenhardt bad advice about cooperating in the investigation.

There is no Sixth Amendment concern raised by this contention. The Sixth Amendment right to counsel does not attach until the initiation of formal criminal proceedings. *Kirby v. Illinois, 406 U.S. 682, 32 L. Ed. 2d 411, 92 S. Ct. 1877 (1972).* Here, there is no allegation that formal proceedings had been initiated when the allegedly bad advice was given. In fact, the present motion recites that the defendant discharged the attorney in question and retained new counsel "to represent him at trial, in lieu of which a plea agreement, by necessity and good counsel, was reached with the Government." (Motion at p.8)

Thus, in that there is no indication that there was any violation of the Sixth Amendment, and in that defendant does not claim the necessary Sixth Amendment predicates of incompetent advice and prejudice in connection with the entry of his plea of guilty to warrant relief under settled law, see *Hill v. Lockhart, 474 U.S. 52, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985),* his second contention is meritless.

Finally, the defendant claims that the Sixth Amendment was violated when his retained attorney failed to advise him to pursue certiorari relief from the Supreme Court after the Fourth Circuit affirmed on direct appeal. The Supreme Court has flatly held that no ineffective assistance claim under the Sixth Amendment is made out by a contention that counsel, retained or appointed, failed to pursue discretionary relief in the Supreme Court.

Wainwright v. Torna, 455 U.S. 586, 71 L. Ed. 2d 475, 102 S. Ct. 1300 (1982); Ross v. Moffitt, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974). In that the Supreme Court's review of federal criminal cases by certiorari is a discretionary review, see *Miller v. Keeney, 882 F.2d 1428, 1432 n.6 (9th Cir. 1989),* there is simply no right to have the advice of counsel in pursuing it. Id. (This does not, of course, take into account the duties of counsel appointed for indigents pursuant to the Criminal Justice Act, who do have a duty under that Act and its implementing plan with regard to certiorari review, see *Proffitt v. United States, 549 F.2d 910 (4th Cir. 1976),* cert. denied, *429 U.S. 1076, 50 L. Ed. 2d 795, 97 S. Ct. 818 (1977),* but no such duty existed here on the part of retained counsel.)

For the stated reasons, an Order will be entered separately that summarily dismisses the present motion.

Dated: July 30, 1998

Frederic N. Smalkin

U.S. District Judge

ORDER

For the reasons stated in a Memorandum Opinion entered herein this date, it is, by the Court, this 30th day of July, 1998, ORDERED:

1. That the Motion for Relief pursuant to *28 U.S.C. section 2255* filed herein BE, and it hereby IS, SUMMARILY DISMISSED, pursuant to Rule 4(b), Rules Governing Section 2255 Proceedings; and

2. That the Clerk mail copies hereof to counsel for the defendant and to the United States Attorney for this District.

Frederic N. Smalkin

U.S. District Judge

UNITED STATES OF AMERICA, Plaintiff, vs. LUIS ARANA, JOSE ALBERTO REYES, LORENZO DOMINGAS, and GILBERTO FELIPE HERNANDEZ, Defendants.

No. 95-CR-80272

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

1998 U.S. Dist. LEXIS 11320

July 24, 1998, Filed

DISPOSITION: Defendants' Motion to Suppress Testimony DENIED.

COUNSEL: For U.S.A.: Michael Stern/Wayne F. Pratt.

For Arana, Defendant: Richard Paul Zipser, Bloomfield Hills, MI.

For Jose Reyes, Defendant: Don Ferris, FERRIS & SALTER, Ann Arbor, MI.

For Dominguez, Defendant: Ellen Dennis, Saline, MI.

For Hernandez, Defendant: Maria Mannarino, Detroit, MI.

JUDGES: PRESENT: Honorable Gerald E. Rosen, United States District Judge.

OPINION BY: Gerald E. Rosen

OPINION: OPINION AND ORDER DENYING DEFENDANTS' MOTION TO SUPPRESS TESTIMONY

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on JUL 24 1998

PRESENT: Honorable Gerald E. Rosen

United States District Judge

I. INTRODUCTION

The above-captioned action is presently before the Court on the Motion to Suppress Testimony filed by Defendant Gilberto Felipe Hernandez and joined in by Defendants Luis Arana, Lorenzo Domingas and Jose Alberto Reyes. The Government has responded to Defendants' Motion. The Court has reviewed and considered the parties' briefs, and having discussed Defendants' Motion with counsel at the Status Conference held on July 16, 1998, the Court is now prepared to rule on this matter. This Opinion and Order sets forth the Court's ruling.

II. FACTUAL BACKGROUND

This is a 17-defendant drug conspiracy/murder for hire action. Thirteen of the defendants named in the indictment have already been tried or have entered guilty pleas. The remaining four defendants – Luis Arana, Jose Alberto Reyes, Lorenzo Domingas and Gilberto Felipe Hernandez (collectively referred to herein as "Defendants") – are awaiting trial which is scheduled to commence on July 22, 1998 before this Court.

On July 9, 1998, Defendants filed the instant Motion to Suppress seeking to preclude the trial testimony of certain witnesses who entered into Rule 11 plea agreements with the Government, including Canelaria DeJesus, Jose Balsce, Cespedes "Angel" Campo, Pascual

Alonzo Perez, Alberto "Mickey" Solis, Roberto Perez Herrera and Leonor Espita. A number of these expected witnesses were also named defendants in the instant indictment.[1]

Defendants maintain that the United States has promised these witnesses and other prospective witnesses to move for downward departures from applicable sentencing guidelines, dismiss other charges, not to file subsequent offender notices, and/or apply on the witness's behalf to the Witness Security Program in exchange for their trial testimony in this case. The Government does not dispute that in entering into plea agreements with a number of witnesses in this case it has made such promises. Relying on *U.S. v. Singleton*, ___ F.3d ___, 1998 U.S. App. LEXIS 15451, 1998 WL 350507 (10th Cir., July 1, 1998), vacated and rehearing en banc granted, ___ F.3d ___, No. 97-3178 (10th Cir., July 10, 1998) (decision noted on WESTLAW), Defendants argue that the Government's promises amount to promises of leniency and, as such, are in violation of subsection (c)(2) of the anti-bribery statute, *18 U.S.C. § 201(c)(2)*, which prohibits the giving, offering or promising of anything of value to any person in exchange for his or her testimony. They further contend that the appropriate remedy for testimony obtained in violation of § 201(c)(2) is suppression of its use at trial.

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[1] Witnesses DeJesus, Balsce, Campo, Solis and Herrera are part of this case. They all have pled guilty pursuant to Rule 11 agreements.

DISCUSSION

A. THE STATUTE

18 U.S.C. § 201(c)(2) provides:

(c) Whoever –

* * *

(2) directly or indirectly gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, . . .

shall be fined under this title or imprisoned for not more than two years, or both.

B. THE SINGLETON DECISION

In *U.S. v. Singleton*, the defendant, Sonya Singleton, was charged with others in a superseding indictment with multiple counts of money laundering and conspiracy to distribute cocaine. Before trial, she moved to suppress the testimony of Napoleon Douglas, a co-conspirator who had entered into a plea agreement with the government. In the plea agreement, Douglas promised to testify in federal and/or state court "in consideration of" the government's promises (1) not to prosecute him for certain offenses; (3) [sic] to inform the district court of the nature and extent of the cooperation provided by Douglas prior to sentencing; and (3) to advise the Mississippi state parole board of the nature and extent of cooperation provided.

Singleton argued in her suppression motion that Douglas's testimony would be given in violation of *18 U.S.C. § 201*(c)(2) and, therefore, it should be suppressed. The district court denied Singleton's motion and the case proceeded to trial.

Upon the close of proofs, the jury convicted Singleton of one count of conspiracy to distribute cocaine and seven counts of money laundering. She was subsequently sentenced to 46 months imprisonment to be followed by three years supervised release.

Singleton appealed her convictions arguing that the district court erred in denying her motion to suppress testimony.[2] The Tenth Circuit agreed and reversed and remanded the matter for a new trial.[3]

The appellate court first found that the anti-bribery provisions of § 201(c)(2) applied to the Government through its agent, the assistant U.S. attorney who negotiated and agreed to the Rule 11 plea agreement with

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[2] She also argued that district court erred in denying her post-trial motion for judgment of acquittal which was predicated on a theory of insufficiency of the evidence.

[3] It is unclear why the appellate court remanded the case for a new trial. Although it is true that the court determined that the district court's failure to suppress Mr. Douglas's testimony was not harmless error as to either the conspiracy or the money laundering convictions, *1998 WL 350507* at * 24, it went on to find that, "excluding the testimony of Mr. Douglas and viewing the remaining evidence and all reasonable inferences from it in the light most favorable to the government . . . a rational jury could have found Ms. Singleton guilty beyond a reasonable doubt of both the conspiracy and money laundering charges." *Id.*

Napoleon Douglas. The court reasoned, "The anti-gratuity provision of Section 201(c)(2) indicates Congress's belief that justice is undermined by the giving, offering or promising anything of value for testimony. If justice is perverted when a criminal defendant seeks to buy testimony from a witness, it is no less perverted when the government does so." *1998 WL 350507* at *3.

The Singleton court further determined the agreement not to prosecute him for certain offenses and the promise to inform the sentencing court and the Mississippi state parole board of the nature and extent of the cooperation provided were "things of value" under the statute because "the obvious purpose of the government's promised actions was to reduce [the testifying co-defendant's] jail time, and it is difficult to imagine anything more valuable than personal physical freedom. *Id.* at * 9.

C. IN ENTERING INTO PLEA AGREEMENTS, IS THE GOVERNMENT SUBJECT TO THE SECTION 201(c)(2)'s PROHIBITION?

The Supreme Court has long recognized a canon of construction which provides that statutes which tend to restrain or diminish the powers, rights, or interests of the sovereign do not apply to the government or affect governmental rights unless the text expressly includes the government. *See United States v. Herron*, 87 U.S. 251, 256, 22 L.Ed. 275 (1873); *United States v. Nardone*, 302 U.S. 379, 383, 58 S. Ct. 275, 276, 82 L. Ed. 314 (1935). The Singleton court acknowledged this rule but determined that it only

applied to two classes of statutes, and found that Section 201(c)(2) did not fit in either class.

The "two classes" of cases which the Singleton court referred to were discussed (briefly) in *U.S. v. Nardone, supra.* The first class consists of statutes which, unless the government is exempted, would deprive the sovereign of a recognized or established prerogative title or interest. *58 S. Ct. at 277.* The classic example of a statute within this first class is the exemption of the sovereign from statutes of limitations. *Id.* The second class is comprised of those statutes which would create an absurdity if applied to the government, as, for example, a speed limit applied to a policeman pursuing a suspect. *Id.*

The Singleton court determined that Section 201(c)(2) did not fit in either of these two classes of statutes.

As an initial matter, this Court believes that the Singleton court read Nardone too narrowly. Nardone does not "limit" application of the canon to only the two classes of cases discussed. All that the Court in Nardone stated was that the canon "has been applied" to cases which fall into two classes. Nothing in that decision or any other Supreme Court decision "limits" application of the canon to only the two classes of cases mentioned.

However, even if Nardone is read to exempt the Government from coverage of a statute only when these two classes of cases are involved, this Court finds that this case fits squarely within the second class of cases – construing Section 201(c)(2) as argued by Defendants would create an absurdity if applied to federal prosecutors in their negotiation and execution of plea agreements. This "absurdity" is evidenced by the inconsistency

that would be [sic] exist between Section 201(c)(2) and the federal immunity statute, *18 U.S.C. § 6001*-6005, because sections 6001-6005 authorize federal prosecutors to give immunity from prosecution for testimony, while section 201(c)(2) criminalizes offering anything of value for testimony. The Singleton court found no inconsistency or absurdity in this because it noted that under §§ 6001-6005, "the government does not give immunity directly for the witness's testimony; the government may move the court to grant immunity," and it is the court that actually "gives" the immunity. *1998 WL 350507* at *6.

In this Court's view, this is no different than a prosecutor moving for a downward departure. The prosecutor is not "giving" anything; in the Rule 11 agreements at issue here, the Government has simply agreed to recommend reduced sentences. It is a matter for the court to decide whether or not to "give" the downward departure.[4]

That application of Section 201(c)(2) to federal prosecutors would work an "absurdity" is further demonstrated by the inconsistency that would exist between the

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[4] It appears to this Court that the Singleton court strained to find that Section 201(c)(2) did not fit within the class of cases in which application of the statute would work an absurdity. Indeed, the Singleton court actually acknowledged the "absurdity" presented between the immunity statute and Section 201(c)(2) when the latter is construed to apply to federal prosecutors but simply it chose to overlook this manifest inconsistency: "We leave for other courts 'the classic judicial task of reconciling [§§ 6001-6005 and § 201(c)(2)], and getting them to 'make sense' in combination.' " *1998 WL 350507* at *6 (citation omitted).

anti-bribery statute and the federal sentencing statutes, *18 U.S.C. § 3553*(e), and the sentencing guidelines.

18 U.S.C. § 3553(e) provides,

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

The amendments which added subsection (e) to § 3553 were adopted two months prior to the adoption of the amendments to Section 201 which resulted in the rewording and recodification of the witness bribery prohibitions in 201(c)(2). See, Pub.L. 99-570, 1986 U.S.Code & Cong. Admin. News, 5393; Pub.L. 99-646, 1986 U.S.Code & Cong. Admin. News, 6139. *28 U.S.C. § 994*(n) referenced in § 3553(e) directs the Sentencing Commission to ensure that the sentencing guidelines reflect "the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Accordingly, the sentencing guidelines provide that the Government may move for a downward departure from the guidelines if it determines that the defendant has "provided substantial assistance in the investigation or prosecution of another person who

has committed an offense . . . ", U.S.S.G. § 5K1.1, and "the appropriate reduction shall be determined by the court for reasons stated that may include the truthfulness, completeness, and reliability of any information or testimony provided by the defendant." U.S.S.G. § 5K1.1 (a)(2) (emphasis added). See also Fed. R.Crim. Pro. 35(b) ("the court, on motion of the Government made within one year after the imposition of the sentence, may reduce the sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense. . . . ")

Clearly, Section 3553(e), Rule 35 and the sentencing Guidelines all anticipate that the Government may intercede on a defendant's behalf and request a reduced sentence in exchange for his agreement to testify on behalf of the Government in the prosecution of others. Given the fact that Section 3553 and Section 201 were amended within two months of each other, if Congress had intended Section 201(c)(2)'s prohibitions to apply to the Government in agreeing to move for reduced sentences in exchange for a cooperating defendant's testimony, it would have said so. By its silence and by its adoption of Section 3553(e), it has effectively said otherwise.

The Singleton court found no inconsistency between application of § 201(c)(2) and the above sentencing statutes, guidelines and rules simply because it noted that "each of these provisions of law authorizes only that substantial assistance can be rewarded after it is rendered; none authorizes the government to make a deal for testimony before it is given." *Id.* at *15 (emphasis added). Yet, there is absolutely nothing in Section 201(c)(2) (or any other of the anti-bribery provisions of Section 201) to

support this premise – i.e., there is nothing in the anti-bribery statute which distinguishes the criminality or non-criminality of "giving of [a] thing of value" in exchange for testimony based upon the timing of the giving.

The Singleton court then went on to attempt to harmonize section 201(c)(2) and the sentencing statutes and guidelines by concluding that "substantial assistance" as used in the sentencing statutes and guidelines must be read to not include testimony. *Id.* at *15. Nothing in the Legislative History of Section 201(c)(2) or its predecessor, *18 U.S.C. § 201*(h) supports this conclusion. Indeed, as indicated above, such a strained construction is belied by the expressly stated Sentencing Guidelines policy statement as to what constitutes "Substantial Assistance to Authorities" under U.S.S.G. 5K1.1 which explicitly includes within the meaning of the term "assistance" as used in the Guidelines, "any information or testimony provided by the defendant".

That Section 201(c)(2) should be construed not to cover federal prosecutors is further bolstered by the well-settled rule that criminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law. *Brogan v. United States*, ___ U.S. ___, 118 S. Ct. 805, 811 (1998). The Singleton court determined, however, that this general rule applies only in the criminal "investigatory" context, and because it found no cases in which the rule was applied to prosecutors representing the government after the initiation of criminal proceedings, it decided that this general rule was inapplicable after an [sic] defendant is indicted. Again, there is nothing in Brogan which supports drawing a line for application of

the rule at the point in time when criminal charges are first initiated.[5]

D. WERE THE PROMISES MADE BY THE GOVERNMENT "THINGS OF VALUE"?

In Singleton, the court determined that because the purpose of government's promised actions was to reduce co-defendant/witness Douglas's jail time, and because "it is difficult to imagine anything more valuable than personal freedom", the promises purportedly made by the Government were "things of value" under Section 201(c)(2). However, in making that determination, the Tenth Circuit panel glossed over what this Court believes is an important issue: who is doing the "giving, offering or promising" of the purported "things of value"?

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[5] Furthermore, Rule 11 plea bargaining can reasonably be viewed as part of the investigatory process in that the process is premised upon a debriefing of the defendant which, as noted by the Advisory Committee in its Notes regarding the 1974 amendments to Rule 11, may "contribute to the successful prosecution of other more serious offenders." Typically, Rule 11 agreements, like the agreements with the co-defendant/witnesses in this case, provide for the defendant to provide testimony at trial, in pretrial proceedings, and before the grand jury. It is well-settled that grand jury proceedings are investigatory proceedings. *See United States v. Calandra*, 414 U.S. 338, 343-44, 94 S. Ct. 613, 617-18, 38 L.Ed.2d 561 (1974) ("A grand jury proceeding is . . . an ex parte investigation. . . . "). *See also, Branzburg v. Hayes*, 408 U.S. 665, 688, 92 S. Ct. 2646 (1972); *Blair v. United States*, 250 U.S. 273, 282, 39 S. Ct. 468, 63 L.Ed. 979 (1919).

E. WHO IS DOING THE "GIVING, OFFERING, OR PROMISING" OF THE THING OF VALUE?

In deciding the Singleton Section 201(c)(2) question, the Tenth Circuit failed to recognize that in entering into Rule 11 agreements with promises to advise the sentencing court of the defendant's cooperation, move for downward departures or recommend dismissal of certain charges, federal prosecutors really are not the parties "giving, offering or promising" personal freedom. This is precisely what was promised to the Government witnesses in this case. In the Rule 11 plea agreements entered into with the Government witnesses whose testimony is at issue, the Government promised as follows:

> Defendant has agreed to provide federal and local law enforcement authorities with assistance in the investigation and prosecution of others who are involved in criminal activities. In this regard, . . .
>
> Defendant promises to provide truthful and complete information to the United States Attorney's office and to other law enforcement agencies. This includes and requires full debriefings and truthful testimony at all proceedings, whether criminal, civil, or administrative. This further includes grand jury proceedings, pretrial proceedings, trials and posttrial proceedings. . . .
>
> * * *
>
> Upon the government's determination that Defendant's cooperation amounts to substantial assistance in the investigation of others involved in criminal activities, the government will request the court to depart downward from the applicable guideline range. . . .

If the government makes such a motion, based on Defendant's substantial assistance, the government will recommend a sentence of ___, rather than the term of imprisonment noted in section II(D) of this agreement. However, the court's failure to follow such a recommendation is not a basis for Defendant to withdraw his guilty plea or to rescind the plea agreement. . . .

The government [further] agrees that at the time of sentencing, it will move to dismiss counts ___ of the superseding indictment. . . .

[See, e.g., Plea Agreements of Cespedes "Angel" Campo, Alberto "Mickey" Solis, Jose Balsce, Candalaria DeJesus and Roberto Perez Herrera.]

Thus, it is clear that all the prosecutors have done here is agree to recommend or request that the sentencing court reduce the co-defendant/witnesses' sentences and move for dismissal of some charges. The Singleton court superficially recognized this ("Although the information [and intervention] promised by the government certainly would not guarantee Mr. Douglas's release, it was an invaluable step toward that end,") but then glossed over it focusing only on the "great value" of the government's promised information and intervention. To accept the Singleton court's premise and take it to its logical conclusion, the sentencing court which accepts a Rule 11 plea agreement and grants the Government's motion to dismiss certain charges or grants a motion for downward departure or for reduction of sentence would, by the Singleton panel's definition, be criminally liable for violating Section 201(c)(2). Of course, it would be absurd to

conclude that Congress intended federal judges to be held criminally liable for taking such actions.

This Court's conclusion that the government cannot be deemed to violate Section 201(c)(2) when it enters into a Rule 11 agreement based upon the defendant's cooperation because it does nothing more than request or recommend that the court take a certain action is supported by the Sixth Circuit's decision in *United States v. Blanton*, 700 F.2d 298 (6th Cir.) reheard in part, *719 F.2d 815 (6th Cir. 1983)*, cert. denied, 465 U.S. 1099 (1984).

Blanton involved the conviction of the former governor of Tennessee and several of his political appointees on various charges of mail fraud, Hobbs Act violations, and conspiracy. The essence of the charges was that the defendants used their positions to see that friends of Blanton would receive retail liquor licenses from the Tennessee Alcoholic Beverage Commission ("ABC"). The most critical evidence against the defendants was the videotaped deposition of Jack Ham, an immunized witness who received a liquor license during Blanton's tenure and who allegedly agreed to give Blanton a cut of the profits in violation of state law. Ham had contributed $1,000 to Blanton's campaign.

After they were convicted, the defendants moved for a new trial on a number of grounds, including "prosecutorial misconduct", contending that the government violated *18 U.S.C. § 201*(h) (the predecessor of section 201(c)(2)) by persuading ABC officials that the public interest would be served if Ham did not have to fear losing his liquor license because of his testimony. The

district court rejected the defendants' argument and the Sixth Circuit affirmed:

We find no violation of § 201(h). The purported "thing of value" – a liquor license – was not offered by the government. The ABC director believed that the public interest would be served by exposure of possible corruption in the ABC during the Blanton administration. Admittedly, the government encouraged the ABC to adopt this viewpoint. But there was no evidence that it had anything at its disposal other than the power of persuasion; there is no evidence of any coercive power on the government's part. Therefore, the offer cannot be said to have come from the government.

This is precisely the situation presented in this case. The prosecutor has nothing more than the power of persuasion to encourage the Court to be lenient in sentencing the testifying co-defendants.

For all of the foregoing reasons, this Court disagrees with the Singleton decision and declines to follow it here. Furthermore, the Government pledges that it will adhere to its obligation to disclose to the jury evidence of its plea agreements with the testifying co-defendants and other witnesses. *See United States v. Giglio*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). *See also, United States v. Barrett*, 505 F.2d 1091 (7th Cir. 1974). As in this case, the defendant in Barrett moved to suppress a witness's testimony against him arguing that the government's plea bargain promises to a witness to drop charges against him and to recommend leniency to the sentencing court in exchange for his testimony violated *18 U.S.C. § 201*(h) (the predecessor of Section 201(c)(2)). The Seventh Circuit

affirmed the trial court's denial of the motion to suppress pointing out that the only remedy to which the defendant was entitled was to admit evidence of the plea agreement and to impeach witness with it when he testified. This is the remedy to which the Defendants in this case are entitled.

CONCLUSION

For all of the reasons stated above in this Opinion and Order,

IT IS HEREBY ORDERED that Defendants' Motion to Suppress Testimony is DENIED.

Gerald E. Rosen

United States District Judge

UNITED STATES of America, Plaintiff,

v.

Luckner GUILLAUME, Defendant.

No. 97-6007-CR.

United States District Court, S.D. Florida.

Aug. 3, 1998.

MORENO

ORDER DENYING MOTION TO SUPPRESS AND EXCLUDE

THIS CAUSE came before the Court upon Defendant's Motion to Exclude the testimony of witnesses for allegedly violating the federal bribery statute, 18 U.S.C. § 201(c)(2), which prohibits offering something of value in exchange for testimony. The Court finds that Congress, in enacting that statute, clearly intended to exclude plea agreements between a defendant and a prosecutor. Therefore, the motion to exclude the accomplice testimony is denied.

ANALYSIS

Congress and the courts have long accepted the reality in criminal procedure that, where government needs will be served, immunity from prosecution may be granted to an individual in exchange for testimony regarding the crime under investigation. *See* 32 A.L.R. 4th 990 (1981). This practice permits the government to obtain testimony in order to effectuate criminal detections, investigations, and prosecutions, in circumstances where the absence of such testimony would lead to the release of criminals to the detriment of society. *See* 32 A.L.R. 4th 990 (1981). Therefore, plea agreements are

essential to the administration of justice and are to be encouraged by the courts. *See Santobello v. United States*, 404 U.S. 257, 260 (1971).

This exchange of reduced sentences or immunity for testimony presents the danger that a witness, influenced by his hope of obtaining a grant of immunity or a reduced sentence, will promise to testify to anything desired by the prosecution. *See* 32 A.L.R. 4th 990 (1981). But because deal striking is so necessary to obtaining prosecutions and enforcing the law, safeguards have been established to protect against such abuses. *See United States v. Dailey*, 759 F.2d 192, 196 (1st Cir. 1985); *United States v. Insana*, 423 F.2d 1165, 1169 (2d Cir. 1970). Courts have uniformly held that a witness may testify so long as: (1) the government's bargain with him is fully divulged so that the jury can evaluate his credibility; (2) defense counsel is permitted to cross- examine the accomplice about the agreement; and (3) the jury is specifically instructed to weight the accomplice's testimony with caution. *See United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987); *Dailey*, 759 F.2d at 196. These rules strike a balance between the competing interests of effective law enforcement and the need for reliable testimony in court, an [sic] manifest, the tenet that "the government cannot be expected to depend exclusively upon the virtuous in enforcing the law." *United States v. Richardson*, 764 F.2d 1514, 1521 (11th Cir. 1985).

Nevertheless, the Tenth Circuit Court of Appeals recently held that the federal bribery statue is applicable to the government. *See United States v. Singleton*, 1998 WL 350507 (10th Cir. July 1, 1998), vacated & reh'g en banc

granted, *United States v. Singleton*, No. 97-3178 (10th Cir. July 10, 1998). The federal bribery statute provides:

> Whoever . . . directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court . . . authorized by the laws of the United States to hear evidence or take testimony . . . shall be fined under this title or imprisoned for not more than two years or both.

18 U.S.C. § 201(c)(2) (West 1998).

Courts have long recognized the rule that statutes do no [sic] apply to the government or affect governmental rights unless the test expressly includes the government. *See Nardone v. United States*, 302 U.S. 379, 383 (1937). This rule applies where a statute would deprive the government of "a recognized or established prerogative title or interest" or where applying the statute to the government would create an absurdity. *Id.* The *Singleton* panel found that the rule did not apply to 18 U.S.C. § 201(c)(2), instead opining that the government is included in the statutory class "whoever." *See Singleton*, 1998 WL 35057, at *5-6. This Court disagrees.[1] The application of § 201(c)(2) to

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[1] Apparently the Tenth Circuit as a whole also has reservations about the panel's extraordinary opinion, as the opinion was vacated pending an en banc rehearing. Moreover, two U.S. District Courts have published opinions rejecting the *Singleton* panel's conclusion. *See U.S. v. Arana*, 1998 WL 420673 (E.D.Mich. July 24, 1998); *U.S. v. Duncan*, 1998 WL 419503 (E.D.La. July 15, 1998).

the government deprives it of a "recognized and established prerogative interest or title," works an obvious absurdity, and threatens to hamper the effectiveness of the government in the investigation and prosecution of crime. Therefore, this Court holds that Congress presumptive excluded the government from the application of § 201(c)(2).

"Recognized or Established Prerogative Interest or Title"

The recommendation of leniency in exchange for testimony is a recognized and established activity of federal prosecutors in the investigation and prosecution of criminal activity. "No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence." *Cervantes-Pacheco,* 826 F.2d at 315. This traditional prosecutorial granting of leniency has, throughout history, been sanctioned by congress and the courts. *See* 18 U.S.C. § 3553(e); 18 U.S.C. §§ 6001-6005; 28 U.S.C. § 994(n); USSG § 5K1.1; Fed.R.Crim.P. 35(b). *See, e.g., United States v. Ford,* 99 U.S. 594, 604 (1878) (holding that a public prosecutor is permitted to induce a witness to fully and fairly testify the guilt of his associates in exchange for the prosecutor's recommendation for executive clemency). The case law is replete with instances of this well-known practice. *See, e.g., United States v. Medina,* 90 F.3d 459, 464 n. 8 (11th Cir. 1996); *United States v. Garcia Abrego,* 141 F.3d 142, 151 (5th Cir. 1998); *United States v. Garcia,* 66 F.3d 851, 857 n. 6 (7th Cir. 1995); *United States v. Benny,* 786 F.2d 1410, 1418 (9th Cir. 1986). In short, the

practice is a recognized and established "prerogative interest or title," and the government is therefore presumptively excluded from the application of § 201(c)(2).

Obvious Absurdity

Applying § 201(c)(2) to federal prosecutors would also work an obvious absurdity in the application of federal statutes. Since its inception, § 201(c)(2) has never been applied to federal prosecutors. The federal sentencing statutes, and the United States sentencing guidelines promulgated as a result of Congressional action, were enacted subsequent to § 201(c)(2), and are in direct conflict with the *Singleton* panel's analysis. It is obvious that Congress intended either to immunize the government from § 201(c)(2), or to supersede the bribery statute as it applies to federal prosecutors. The federal criminal sentencing statue, 18 U.S.C. § 3553(e), provides: "Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Section 994(n) of Title 28 instructs the United States Sentencing Commission to ensure that guidelines reflect "the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Similarly, Fed.R.Crim.P. 35(b) provides: "The court, on motion of the Government made within one year after the

imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense. . . . " Thus, Congress has sanctioned leniency by federal prosecutors to induce a defendant's "substantial assistance" in another defendant's investigation or prosecution.

These statutes, which authorize the rewarding of substantial assistance after it is rendered, would be in conflict with § 201(c)(2) under the *Singleton* panel's analysis. The *Singleton* panel's attempt to reconcile the statutes by declaring that substantial assistance does not include testimony, *see* 1998 WL 350507, at *16, is no [sic] convincing. This Court, like most throughout the nation, has for the last eight years reduced sentences, upon the motion of the government filed in response to a defendant's testimony. Thus, the application of § 201(c)(2) to the government would not merely result in the exclusion of the testimony of accomplice witnesses, but would also necessitate the bizarre conclusion that federal prosecutors routinely violate the law by promising to move to reduce the sentences of defendants in exchange for their testimony.

Many district judges, including this one, have expressed frustration at minimum mandatory sentences and resulting reductions available to those with little information and thus little testimony to provide. Nevertheless, Congress has maintained its position to reward cooperation and testimony with a reduction in the sentence. Even the Congressional response to some public

objection to the harsh penalties facing first offenders has included a requirement of cooperation.[2]

The federal sentencing statutes explicitly provide for grants of immunity and reduces sentences in exchange for testimony from a witness. USSG § 5K1.1 provides that the government may move for a downward departure from the guidelines if it determines that the defendant has "provided substantial assistance in the investigation or prosecution of another person who has committed an offense. . . . The appropriate reduction shall be determined by the court for reasons stated that may include . . . the truthfulness, completeness, and reliability of any information or testimony provided by the defendant." (emphasis added). Thus, this provision expressly allows for the government to reward a defendant for testifying, and the *Singleton* panel's attempt to distinguish "substantial assistance" from testimony therefore fails to reconcile its terms with their radical interpretation of § 201(c)(2).

Applying § 201(c)(2) to federal prosecutors also works an absurdity in view of the federal immunity statute, 18 U.S.C.A. §§ 6001-6005. The *Singleton* panel noted that §§ 6001-6005 "authorize 201(c)(2) criminalizes offering anything of value for testimony," 1998 WL 350507, at * 7, yet the panel failed to harmonize these statutes. A promise by a federal prosecutor to grant immunity is a

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[2] 18 U.S.C. § 3553(f)(5) and U.S.S.G. § 5C1.2(5) require a defendant to disclose all the information he possesses about his involvement in the crime, including the identities and participation of others, before his is eligible for the safety valve provisions allowing for a sentence below the minimum mandatory.

thing of value, since a witness subjectively attaches value to it. See *Singleton*, 1998 WL 350507, at *9. In short, this statute provides further evidence that Congress intended to exclude the government from the application of § 201(c)(2) when granting leniency in exchange for testimony, in order to effectuate an investigation or prosecution.

CONCLUSION

The statutory class "whoever" in the federal bribery statue, § 201(c)(2), was not intended to encompass a federal prosecutor actually engaged in the investigation or prosecution of a crime. The law has always recognized a manifest difference between a private individual offering another individual money in return for testimony in court and a federal prosecutor promising a witness a recommendation to a court for a downward departure in exchange for testimony. The fact that § 201(c)(2) has never been applied to federal prosecutors and that safeguards have been established to curtail abuses of this well-established practice make clear that Congress and the courts have sanctioned this practice as a necessary investigatory and prosecutorial activity, one that, in fact, predates the founding of our nation, *See, e.g., Rex v. Rudd*, 1 Cowp. 331 (1775) (holding that a prosecutor may give hope to an accomplice that if he discloses the whole truth, he may, by a recommendation of mercy, save himself from punishment and secure a pardon). The holding of the *Singleton* panel would dangerously disable the government's investigatory and prosecutorial powers. Surely if Congress had intended to eliminate a procedure so well-

established, it would have done so in clear, unambiguous terms. Accordingly, it is

ADJUDGED that Defendant's motion to exclude is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 3rd day of August, 1998.

UNITED STATES OF AMERICA,

v.

Marcellus REID, Defendant.

No. Crim.A. 3:98CR64.

United States District Court, E.D. Virginia.

July 28, 1998.

John Kenneth Zwerling, Zwerling & Kemler, P.C., Alexandria, VA, Mark J. Rochon, Rochon, Roberts & Stern, Washington, DC, Lisa Bondareff Kemler, Zwerling & Kemler, Alexandria, VA, for Marcellus Reid, defendant.

David John Novak, Hannah Lauck, United States Attorney's Office, Richmond, VA, for U.S.

MEMORANDUM OPINION

SPENCER, J.

THIS MATTER is before the Court on two motions. The first is a motion by defendant Marcellus Reid to suppress testimony of certain government witnesses under the reasoning of *United States v. Singleton*, No. 97-3178, 1998 WL 35057 (10th Cir. July 1, 1998), reh'g en banc granted, opinion vacated, No. 97-3178 (10th Cir. July 10, 1998). The second is a motion by the defendant to suppress certain evidence. For the reasons stated below, the Court DENIES both motions.

I. Motion to Suppress Testimony of Government Witnesses Pursuant to *Singleton*

Reid moves to suppress the testimony of all witnesses that have received or been promised anything of value for their testimony. His motion is based on the three-judge panel decision in *United States v. Singleton*, where the Court held that any promise made by the government to a witness in exchange for truthful testimony violates the criminal gratuity statute, 18 U.S.C. § 201(c)(2). At the outset, the Court wants to make it clear that the holding in the *Singleton* case is not the law in the Fourth Circuit. In addition, the Court notes that the *Singleton* decision has been vacated by the Tenth Circuit; consequently, there is no place in this country where it is legally binding. However, as the defendant has presented to this Court the issue raised in *Singleton*, that is, whether a U.S. Attorney's promises in exchange for truthful testimony violates the law, the following analysis is necessary.

The criminal gratuity statute at issue in *Singleton* and here states, in relevant part:

> Whoever . . . directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony . . . as a witness upon a trial, hearing, or other proceeding . . . shall be fined under this title or imprisoned for not more than two years, or both.

18 U.S.C. § 201(c)(2). According to the three-judge panel of the Tenth Circuit, the U.S. Attorney's promises in

its case[1] constituted "things of value" that were "for or because of" the coconspirator's testimony in the *Singleton* trial. To reach its decision, the Tenth Circuit first looked at the "statutory plain language" of Section 201(c)(2), which the Court suggested was broad. 1998 WL 350507 at *3-4. The Court broadly construed "whoever" and held that the class of persons that can violate the statute includes U.S. Attorneys. However, this Court disagrees.

Section 201(c)(2) Does Not Apply to the U.S. Attorney

In *Nardone v. United States*, 302 U.S. 379, 58 S. Ct. 275, 82 L.Ed. 314 (1937), the United States Supreme Court described a canon of statutory construction where a statute does not apply to the government or affect governmental rights unless the text of the statute expressly includes the government. *Id.* at 383. The Supreme Court stated that the canon has been applied in two kinds of situations. "The first is where an act, if not so limited,

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[1] In the plea agreement, the U.S. Attorney promised: (1) not to prosecute the cooperator for any other violations of the Drug Abuse Prevention and Control Act stemming from his activities then under investigation (with the exception of perjury or related offenses); (2) to advise the sentencing court of the nature and extent of the cooperation provided by the coconspirator; and (3) to advise the state parole board of the nature and extent of his cooperation. *Singleton*, 144 F.3d 1343, 1998 WL 350507 at *2. In return, the coconspirator agreed "in consideration of the items listed in paragraph 2 above . . . [to] testify[ ] truthfully in federal and/or state court . . . . " *Id.* at *2.

In the instant case, the United States concedes that the standard plea agreement and cooperation provisions used in the Eastern District of Virginia substantially mirror those at issue in *Singleton*.

would deprive the sovereign of a recognized or established prerogative title or interest." *Id.* at 383. At the same time that the Court described this first exception, the Court noted that "[t]he rule of exclusion of the sovereign is less stringently applied where the operation of the law is upon the agents or servants of the government rather than on the sovereign itself." *Id.* at 383 (emphasis added). In reviewing this statement by the Supreme Court, this Court notes that the words "less stringently applied" were used, rather than a declaration that the exception never applies to government agents.

The second category described by the *Nardone* Court is "where a reading which would include such [government] officers would work obvious absurdity." *Id.* at 384. In the instant case, the Government argues that applying Section 201 to standard plea agreements in this District (and all others) would "work obvious absurdity" and would run contrary to the criminal justice system which has been in place for decades. This Court finds the Government's arguments persuasive.

There are several legal examples as to how prosecutors have historically been supported by the federal courts in recommending leniency in exchange for testimony. In the *Whiskey Cases*, 99 U.S. 594, 25 L.Ed. 399 (1878), the Supreme Court recognized the practice:

> Prosecutors in such a case should explain to the accomplice that he is not obliged to criminate himself, and inform him just what he may reasonable expect in case he acts in good faith, and testifies fully and fairly as to his own acts in the case, and those of his associates. When he fulfills those conditions he is equitably entitled to a

> pardon, and the prosecutor, and the court if need be, when fully informed of the facts, will join in such a recommendation.

Id. at 604. Since the Supreme Court's recognition in the *Whiskey Cases*, there have been numerous implicit and explicit recognitions of the legitimacy of inducing witnesses to testify by offering them promises of leniency. An example not adequately dealt with in *Singleton* is *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), where a U.S. Attorney failed to disclose to the defense the government's promise to a government witness that he would not be prosecuted if he cooperated. The Supreme Court held that nondisclosure of the promise amounted to a violation of due process. While the Supreme Court did not directly address the issue of whether the promise itself was problematic, the Court did rule that the government must disclose a promise of leniency made to a key witness in exchange for that witness' testimony. The Court's holding implicitly suggests that the promises themselves are permissible.[2]

In any event, there is an endless number of federal cases among the Circuits in favor of plea agreements. In *United States v. Dailey*, 759 F.2d 192 (1st Cir. 1985), the Court held that the risk of perjury created by the defendant's alleged accomplices' plea agreements was not so great that defendant's due process rights were violated by the admission of the accomplices' testimony at trial. In

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[2] The *Singleton* Court believed, however, that *Giglio* could not be dispositive on whether the promises are permissible under Section 201(c)(2) because the question was not squarely presented to the Supreme Court.

the words of the Court, "[l]ong ago the courts rejected the notion that the testimony of co-defendants and other interested witnesses was so likely to be unreliable that it should be excluded." *Id.* at 196. In *United States v. Barrett*, 505 F.2d 1091 (7th Cir. 1974), the Seventh Circuit held that the government has the authority to allow civil immunity in return for testimony and stated that "[i]f the government can excuse criminal or civil liability in settling a criminal case, surely it can use that power of compromise to obtain a guilty plea or to procure testimony in other proceedings. Both are legitimate objectives of plea agreements." *Id.* at 1102. *See also United States v. Kimble*, 719 F.2d 1253 (5th Cir. 1983); *Lyda v. United States*, 321 F.2d 788, 794-95 (9th Cir. 1963). If the concern is that plea agreements will taint witness testimony, as it seems to be in *Singleton*, this Court emphasizes that disclosure of the plea agreements to defense before trial, cross-examination of cooperating witnesses, and jury instructions all provide opportunity to ferret out false testimony that an interested witness might give because of a government promise. Also, most defendants who make plea agreements with the Government are made to understand that the agreements are not based on the conviction of anyone, rather they are based on truthful testimony.

With that said, the Court must agree with the Government that the second exception described in *Nardone* applies here. There is a long history of plea agreements of the type in *Singleton* being accepted by federal courts. As the Fifth Circuit has stated, "no practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and

having that witness testify under a plea bargain that promises him a reduced sentence." *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987), *cert. denied*, 484 U.S. 1026, 108 S.Ct. 749, 98 L.Ed.2d 762 (1988). In many cases, as stated by the First Circuit in *Dailey*, the most knowledgeable witnesses available to testify about criminal activity are indicted coconspirators. *See Dailey*, 759 F.2d at 196. In fact, this Court believes that there are situations where those individuals may be the only credible witnesses of criminal activity and, without their testimony, the government would not be able to obtain convictions. It is naive to assume that most coconspirators would be so altruistic as to abandon their own self-interest and testify for the very government that seeks a stiff sentence against them without a bargain being made. To prohibit prosecutors from making promises in exchange for testimony works an "absurd" result where crimes go unresolved because of worries about testimony that may be questionable, even though the system already has built-in safeguards concerning questionable testimony by interested witnesses.[3]

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[3] For this Court to hold otherwise, the Court would have to ignore the intent of other federal statutes addressing immunity and sentencing reductions.

Congress has codified aspects of the long-accepted bargaining practice between prosecutors and cooperating individuals, by passing a number of statutes, including: 28 U.S.C. § 994(n) (directing the Sentencing Commission to ena [sic] guidelines that allow for sentences under the minimum statutory sentence in order to take into account substantial assistance by defendants); 18 U.S.C. § 6003 (authorizing district courts to grant immunity to a witness where the Justice Department concludes a witness is likely to refuse to testify); 18

In short, the right on the part of the prosecutor to make promises of leniency in exchange for testimony is as old as the institution of the criminal trial. This Court holds that a reading of Section 201(c)(2) that includes government attorneys would work "obvious absurdity" and, thus, this case falls within the canon expressed in *Nardone* that "the general words of a statute do not include the government or affect its rights unless the construction be clear and indisputable upon the text of the act."[4] Therefore, the motion to suppress testimony is DENIED.

II. Motion to Suppress Evidence

The defendant also moves for an order prohibiting the government from introducing any evidence obtained as a result of the warrantless search of a 1988 Buick Regal, which the defendant claims that he owns. Specifically, the defendant would like to suppress information about the existence of secret compartments in the Buick.

U.S.C. § 3521 (authorizing witness relocation by the Attorney General for a potential witness subject to danger).

[4] Although this argument was not made by the Government, the Court also believes that Section 201(c)(2) does not apply to the U.S. Attorney because the first *Nardone* exception applies. The right on the part of the prosecutor to make promises of leniency in exchange for testimony is as old as the institution of criminal trial and must accurately be described as a "recognized or established prerogative title or interest" of the sovereign.

The Government relates the following as background. On May 17, 1996, a grand jury sitting in Richmond returned an indictment charging Ronald and Stephen Zebrowksi, Jr. with continuing criminal enterprise (CCE) and related narcotics offenses. After Ronald Zebrowski escaped from the custody of the Hanover County Sheriff's Department, where he had been in state custody at the time of indictment, an international manhunt ensued for the Zebrowski brothers. On July 14, 1996, Deputy United States Marshal Michael Moran learned that that Stephen Zebrowski, Jr. was at a particular Red Roof Inn in West Palm Beach, Florida. He found out that Zebrowski was there with another Zebrowski organization member, Steven C. Jones and that they had rented two rooms. Apparently, they shared the rooms with a number of women and had three vehicles at the hotel, including the 1998 Buick Regal.

Moran subsequently arrested Zebrowski in a room where a woman named Karen Mitchell was present. When Moran interviewed Mitchell, she stated that she had drive [sic] the Buick Regal to Florida from Maryland and that the car belonged to Zebrowski. Zebrowski, who had denied that he was Stephen Zebrowski, Jr., claimed that his name was Brandon Murray and denied any connection to the car. When Moran asked Mitchell if he could search the car, she said yes, told him where the keys were, and gave him permission to use them. At that time, the hotel employees were also telling Moran that the cars had to be removed. Moran impounded the car and later conducted what the Government calls an inventory search of the car. After a drug-detecting dog checked the car and alerted to the presence of drugs, Moran looked

for and found a secret compartment in the car.[5] However, he did not find any drugs in the car.

Ultimately Stephen Zebrowski, Jr. pled guilty to CCE and, as part of his plea agreement, consented to the forfeiture of the Buick Regal. On September 30, 1996, the Court entered an Order of Forfeiture. The defendant in the instant case (Reid) began an "innocent owner' claim of the car but withdrew his claim when he was informed that he had to give a deposition under oath. Still, the defendant claims that the car was registered to him and that this confers standing on him to now seek suppression of evidence obtained from the car.

The burden rests upon the defendant to establish standing prior to litigation of the suppression motion. *Rawlings v. Kentucky*, 448 U.S. 98, 104, 100 S. Ct. 2556, 65 L.Ed.2d 633 (1980). "[O]wnership of the item seized is, by itself, insufficient to confer a privacy interest in the area searched. At most, an interest in the items found may be a factor considered when deciding whether there is a privacy interest in the area searched." *United States v. Manbeck*, 744 F.2d 360, 374 (4th Cir. 1984). In addition, the Fourth Circuit has recognized that a defendant may lack standing to challenge the search of property that he abandons. *See United States v. McDonald*, 61 F.3d 248, 255 (4th Cir. 1995) (defendant lacked standing to challenge search of car that was abandoned off public highway).

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[5] Moran knew Zebrowski was a large-scale drug trafficker that routinely used secret compartments to transport drugs from Florida. (See Govt. Opp. Mot. Suppress Evid, 3:96CR41 Indictment Attached, page 6, para. 6.)

The Government argues that the defendant abandoned his interest in the Buick when he gave it to Zebrowski to use in transporting drugs. The Government also points to the fact that the Buick was discovered by Moran in Florida, nearly 1500 miles away from Reid, and that the only person claimed by the individuals in the motel rooms to have ownership of it, Zebrowski, was denying any claim to the car. Indeed the Court has substantial question as to whether the defendant has standing simply because the car is registered to him, for he was in Maryland at the time the operative events occurred in Florida. In addition, one could make the argument that he abandoned the car.

Even assuming standing, however, the Court believes that consent from Mitchell was sufficient to make the search of the car valid. "When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected."[6] *United States v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). This Court concludes that it was reasonable for Moran to believe that Mitchell had the authority to consent. After all, Mitchell was the only one claiming any

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[6] "Common authority" rests on "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Id.*

connection to the car when the hotel needed it to be moved. Even if Moran was wrong in believing she had authority, the U.S. Supreme Court and the Fourth Circuit have ruled in other cases that suppression is not necessary where the police officer's belief that a third party had authority to consent was reasonable. *See Illinois v. Rodriguez*, 497 U.S. 177, 110 S. Ct. 2793, 111 L.Ed.2d 148 (1990); *United States v. Kinney*, 953 F.2d 863, 866-67 (4th Cir. 1992).

Since there is no temporal limitation on Mitchell's consent to search the car, her consent was valid until revoked. This means that Moran could have searched the car from tire to steering wheel two days after the consent was given. Consequently, the search at issue was valid. The motion to suppress is DENIED.

An appropriate Order shall issue